FEB 25 1924
WM. R. STANSBU
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 122.

THE SAN FRANCISCO AND PORTLAND STEAMSHIP COMPANY, *Plaintiff in Error.*

vs.

A. J. PARRINGTON, *Defendant in Error.*

No. 123.

JAMES C. DAVIS, AGENT, UNITED STATES RAILROAD ADMINISTRATION, *Plaintiff in Error,*

vs.

A. J. PARRINGTON, *Defendant in Error.*

MOTION OF DEFENDANT IN ERROR.

For an Order to Reconsider the Rule Announced in Kansas City Southern vs. Wolf, 43 S. C. R. 259, With Reference to the Limitation of Actions in View of Subsequent Legislation of Congress and to Receive and Consider the Accompanying Argument on Said Reconsideration.

JAMES G. WILSON,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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MOTION.

Comes now the defendant in error in the above-entitled cases and moves the Court under its rule announced by the Honorable Chief Justice at the argument of the above-entitled causes (to wit: that the Court will not permit or receive argument for reconsideration of a rule announced in a decided case without special leave of Court), that the Court grant such leave and reconsider the rule as announced in case of Kansas City Southern vs. Wolf, 43 S. C. R. 259, on the question of limitation of actions arising under the Act to Regulate Commerce, in view of the legislation of Congress enacted subsequently to the facts in said Wolf case, and that the Court receive and consider the accompanying argument on such reconsideration.

THE FACTS.

The facts on which this motion is based are:

1. That the rule as to the limitation of actions on claims which may be sued on in Court without prior submission to the Interstate Commerce Commission as announced in Kansas City Southern vs. Wolf is based not upon any limitation prescribed by the Act to Regulate Commerce as to actions commenced primarily in court, the Act in that record being silent, but upon the fact that said Act at the time the claims in said Wolf case arose prescribed a limitation of two (2) years within which proceedings before the Interstate Commerce Commission on claims for reparation could be filed and that the rule of uniformity in the administration of said Act required the same limitation period to be applied to the commencement of actions in Court.

2. That in and by Sec. 206(a) of the Transportation Act of 1920, enacted by Congress subsequently to the facts giving rise to the claims in the Wolf case, it is provided

> "Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such character as prior to Federal Control could have been brought against such carrier, may, after the termination of Federal Control be brought against an agent designated by the President for such purpose. * * * Such actions * * * may within the periods of limitation now prescribed by State or Federal statutes, but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal Control would have had jurisdiction of the cause of action, had it arisen against such carrier."

And in and by Sec. 206(c) of the Transportation Act of 1920 it is provided

> "Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal Control of rates, fares, charges, classifications, regulations, or practices (including those applicable to interstate, foreign or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal Control against the agent designated by the President. * * *"

and that in and by Sec. 206(f) of said Transportation Act it is provided

> "The period of Federal Control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal Control."

and in and by the amendment to Sec. 16 of the Interstate Commerce Act as enacted in the Transportation Act of 1920, it is provided

> "All actions at law by carriers subject to this Act for recovery of their charges or any part thereof, shall be begun within three years from the time the cause of action accrues and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, unless the carrier after the expiration of such two years or within ninety days before such expiration begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun. In either case the cause of action in respect of a shipment of property shall for the purposes of this section be deemed to accrue on delivery or tender of delivery thereof by the carrier, and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District Court or State Court within one year from the date of the order, and not after."

3. The complaints in these two causes were filed in the District Court of the United States on the 12th day of February, 1921, within one year after the pas-

sage of the Transportation Act of 1920, which Act was passed February 28, 1920. The rule of limitations prescribed in the Wolf case should be modified in the present case in view of this additional legislation. The defendant in error asks a reconsideration of the rule announced in the Wolf case, and respectfully requests that the argument hereinafter submitted be filed and considered by this Court and the proper rule of limitation be applied in the pending cases.

Respectfully submitted,

JAMES G. WILSON,
Attorney for Defendant in Error.

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ARGUMENT.

On the Question of Limitation Submitted with Motion for Leave to Reconsider the Rule of Limitation Announced in Kansas City Southern vs. Wolf.

On the argument in the above-entitled causes the Court refused to permit argument on the question of the limitation of actions on claims arising under the Act to Regulate Commerce, commenced primarily in the courts. This refusal was due in part perhaps to the ignorance of the attorney of defendant in error of the rule and his misconception of it when the same was announced by the Chief Justice at the argument, for we apprehend that the Court would have permitted the argument in view of the legislation of Congress of 1920, with reference to the statute of limitations apply-

ing to the pending actions and not applying to the claims in the Wolf case. In other words, that counsel would have been permitted to call attention to the subsequent legislation of Congress bearing upon the present cases which, in fact, constitute a differentiation of the Wolf case.

At the time of the accruing of the claims in the Wolf case, to wit, 1913, Sec. 16 of the Act to Regulate Commerce simply prescribed a period of two years within which proceedings before the Interstate Commerce Commission for recovery of reparation should be commenced. That section, and in fact, the whole act was entirely silent upon the limitation of actions in court for the recovery of damages under Secs. 8 and 9 of the Act. The decision in the Wolf case limiting the period of commencement of actions in court to two years, was based on the principle of uniformity in the administration of the Interstate Commerce Act, and adopted under that principle the period limited by the Act for proceedings before the Commission. The Transportation Act of 1920 had no bearing on the claims in the Wolf case and was not considered in that case. The Transportation Act does, however, have a material bearing on the period of limitation of claims in the present cases. The present actions were commenced on February 12, 1921, less than one year after the passage of the Transportation Act of 1920, in and by Sec. 206(a) of which it is provided:

> "Actions at law * * * based on causes of action arising out of the possession, use or operation by the President of the railroad or system of transportation of any carrier (under the provisions of the Federal Control Act or of the Act of August 29, 1916) of such character as prior to Federal

> Control could have been brought against such carrier may after the termination of Federal Control be brought against an agent designated by the President for such purpose. * * * Such actions, suits, or proceedings may *within the periods of limitation now prescribed by State or Federal statutes,* but not later than two years from the date of the passage of this Act, be brought in any court which but for Federal Control, would have had jurisdiction of the cause of action had it arisen against such carrier."

There is no Federal statutory period of limitation prescribed for the commencement of actions in court under Secs. 8 and 9 of the Act to Regulate Commerce. The only statutory period as referred to in the last-above quoted section would therefore be the State statute of limitations of Oregon, which is six years, and this we submit should be applied subject to the further limitation in the section just quoted requiring actions of such character to be commenced within two years from the date of the passage of the Act.

So far as the claims sued on Cause No. 123 are concerned, the action would be in time as to all claims under this statute, which applies to all actions arising during the period of Federal Control.

If, however, the principle of uniformity announced in the Wolf case obtains, notwithstanding the above-quoted sections of the Transportation Act, still the action as to all claims during the period of Federal Control was commenced in time, for the Transportation Act contains a definite period of limitation as to claims before the Commission. Section 206(c) of the Transportation Act prescribes the limitation for all claims during the period of Federal Control, as follows:

> "Complainants praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President during the period of Federal Control of rates, fares, charges, classifications, regulations or practices (including those applicable to interstate, foreign, or intrastate traffic) which were unjust, unreasonable, unjustly discriminatory or unduly or unreasonably prejudicial or otherwise in violation of the Interstate Commerce Act, may be filed with the Commission within one year after the termination of Federal Control against the agent designated by the President * * *."

Therefore, whether the limitation specifically designated as to actions in court under Sec. 206(a) is applied, or whether under the rule of uniformity the limitation prescribed for proceeding before the Commission under Sec. 206(c) is applied, the action as to all claims against the Director General was in time, and therefore there should be no diminution of the judgment against the Director General on account of the statute of limitations.

We deem it further pertinent to call the Court's attention to the fact that no question of the statute of limitations in either of the lower courts was ever raised as to case against the Director General. The Director General did not consider that the statute of limitations had run as to any of the claims in that case, and the lower court did not pass upon any such question. Indeed, no thought of any such question ever arose until the decision of this Court in the Wolf case, when the principle there announced was attempted to be engrafted into the record.

As to the claims in Cause No. 122, the question was

raised as to the limitation of all claims prior to January 1, 1918, not on the basis of the limitation prescribed for proceeding before the Commission, but on the basis of a statute of the State of Oregon, which it was claimed applied, but even as to claims in this case, the legislation of 1920 applies, for in and by Sec. 206(f) of the Transportation Act it is provided:

> "The period of Federal Control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to Federal Control."

The Transportation Act was passed February 28, 1920. The actions having been commenced on February 12, 1921, were fourteen days within one year from the passage of the Act. The period of Federal Control commenced at noon on December 28, 1917, and extended to and included February 29, 1920, so that the period of one year and fifteen days prior to Federal Control was still within the two-year period of limitation, eliminating, as the statute provides, the period of Federal Control, which would bring all claims arising on or after December 13, 1916, within the period of limitation, and hence there would be eliminated on this basis of figuring only those claims arising between May 10, 1916, and December 13, 1916. But we submit that by the amendment of Sec. 16 of the Interstate Commerce Act by the Transportation Act of 1920 the period of limitation under the rule of uniformity of administration should be extended to a period of three years and ninety days at least. This amendment of Sec. 16 reads as follows:

> "All actions at law by carriers subject to this Act for recovery of their charges or any part thereof

shall be begun within three years from the time the cause of action accrued, and not after. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after, *unless the carrier after the expiration of such two years or within ninety days before such expiration begins an action for recovery of charges in respect of the same service, in which case such period of two years shall be extended to and including ninety days from the time such action by the carrier is begun.*

"In either case, the cause of action in respect of a shipment of property shall for the purposes of this section be deemed to accrue upon delivery or tender of delivery thereof by the carrier and not after. A petition for the enforcement of an order for the payment of money shall be filed in the District court or State court within one year from the date of the order, and not after."

The amendment of this section by the Transportation Act of 1920 extended the possible time for proceedings before the Commission to a period of three years and ninety days, depending upon the time within which a carrier might commence an action against a shipper. On the principle of uniformity of administration, therefore, the period of limitation for actions in Court should be similarly extended, and therefore instead of a two years period of limitation as held in the Wolf case, we submit that the limit for actions in court should not be restricted to a period of less than three years and ninety days, the longest period that any shipper can commence a proceeding before the Commission, as the Court can readily see that otherwise a carrier might extend the period for applying to the Commission for some shippers by commencing actions against them,

whereas other shippers similarly situated but who were not sued would be deprived of their remedy and thus the two-year period of limitation prescribed by the Court would become a means of discrimination instead of a rule of uniform application of the Act. Likewise, if this extended period of limitation before the Commission is to obtain as prescribed by the statute, then on the principle of uniformity the same period should be open to the shipper to make any such defense in the courts in case he is sued by the carrier. For if the period of limitation before the Commission is to be applied in the courts in one case it should be applied in the courts in all cases. But this idea is contrary to the contention of counsel for the Director General, for he stated that after the two years' period of limitation had expired a shipper who had been sued could not in fact make any counterclaim on account of the shipments moving more than two years prior to the commencement of the action by the carrier. It will readily be seen that unless the longest period in which any shipper may apply to the Commission is applied as the period of limitation to actions in court that the principle announced in the Wolf case will become the means of very great lack of uniformity in the administration of the law and that these elements have arisen by reason of the legislation of Congress subsequent to the accrual of the claims in the Wolf case, and the rule announced in the Wolf case should therefore be reconsidered to harmonize the rule with the later legislation.

In view of these subsequent acts of Congress and their varying and elastic periods of limitations, and the fact that there is no specific statutory limitation prescribed in the Act as to actions in court, is not the necessity for the uniformity in the period of limita-

tion eliminated entirely and should not the principle which had always obtained that where no period of limitation has been prescribed in the Federal statute that the statute of limitation prescribed by the State law obtains; and should not therefore the Court hold in view of this later legislation that the proper period of limitation of such actions in court now and since the Transportation Act of 1920, as the period of limitation prescribed by the State statute which in this case is six years?

But whether the Court in the reconsideration of this question concludes that the stated statutes shall apply or that the period of three years and ninety days applies, or that the two year period applies, yet as heretofore pointed out the limitation in any event in view of the Transportation Act of 1920 will not reduce the amount of recovery at all in cause No. 123 and will reduce the claims in cause No. 122 only in the event that the two year period still obtains, and that period by elimination of the period of Federal Control will apply only to those shipments moving prior to December 13, 1916, and to no others.

Respectfully submitted,

JAMES G. WILSON,
Attorney for Defendant in Error.